Supreme Court, U.S.
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No. 97-705

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

KERR-MCGEE CORPORATION
AND CYPRUS FOOTE MINERAL COMPANY,

PETITIONERS,

V.

KEE TOM FARLEY, INDIVIDUALLY AND
ON BEHALF OF THE ESTATE OF LUCY K. FARLEY,
CARMELITA FARLEY JOE,
AND HAROLD KADY, SR., INDIVIDUALLY AND
ON BEHALF OF THE ESTATE OF JULIA MAE KADY,

RESPONDENTS.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

PETITIONERS' REPLY BRIEF

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13 pp

TABLE OF CONTENTS

Page

ARGUMENT 1

CONCLUSION 9

TABLE OF AUTHORITIES

CASES

Page

Barnett Bank v. Nelson,
517 U.S. 25, 116 S. Ct. 1103 (1996) 5, 6

Church of Scientology v. United States,
506 U.S. 9 (1990) 2

English v. General Elec. Co.,
496 U.S. 72 (1990) 4

Federal Power Comm'n v. Tuscarora Indian Nation,
362 U.S. 99 (1960) 5

In re TMI Litig. Cases Consol. II,
940 F.2d 832 (3d Cir. 1991) 7

National Farmers Union Ins. Cos. v. Crow Tribe,
471 U.S. 845 (1985) 2, 4, 6

O'Conner v. Commonwealth Edison Co.,
13 F.3d 1090 (7th Cir. 1994) 7

Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n,
461 U.S. 190 (1983) 4

Reich v. Mashautucket Sand & Gravel,
95 F.3d 174 (2d Cir. 1996) 5

Page

Smart v. State Farm Ins. Co.,
868 F.2d 929 (7th Cir. 1989) 5

Strate v. A-1 Contractors, ___ U.S. ___,
117 S. Ct. 1404 (1997) . . . . . *passim*

STATUTES AND REGULATION

Atomic Energy Act, as amended, 42 U.S.C. §§ 2011,
et seq. ("AEA") . . . . . *passim*

§ 2014(hh) 6, 7

§ 2021 4

§ 2021(b) 4

§ 2210(n)(2) 7

Price-Anderson Act,
Pub. L. No. 85-256, 71 Stat. 576 (1957),
as amended by the Price-Anderson Amendments
Act of 1988, Pub. L. No. 100-408, 102 Stat.
1066 (1988) ("PAA") . . . . . *passim*

10 C.F.R. § 8.4 (1997) 4

ARGUMENT

This case presents the question whether a party sued in tribal court must exhaust its tribal court remedies when it is plain that the tribal court may not exercise jurisdiction over the cause of action. In *Strate v. A-1 Contractors*, ___ U.S. ___, 117 S. Ct. 1404, 1416 n.14 (1997), this Court held that where "tribal courts lack adjudicatory authority" over a dispute, requiring exhaustion "would serve no purpose other than delay." Certiorari is warranted because the decision of the Tenth Circuit is flatly inconsistent with *Strate* and because the issue is of great practical importance. Respondents' attempts to deflect attention from the central flaws in the court of appeals' decision are unavailing.

1. Respondents contend (Br. in Opp. 4) that petitioners are not prejudiced because petitioners will eventually have an opportunity — after the trial and appellate proceedings in the tribal court system have been concluded — to obtain federal court review of the question of tribal court jurisdiction. That contention misses the point.

a. The issue of tribal court jurisdiction is fully ripe for review now. Resolution of that issue turns on whether the federal government's pervasive regulation of the field of nuclear health and safety in the Atomic Energy Act, as amended ("AEA"), and Congress' creation of the exclusive federal adjudicatory scheme in the Price-Anderson Act, as amended ("PAA"), foreclose tribal courts from exercising jurisdiction over nuclear torts.

There is no reason to await the development of evidence in the tribal court because no factual record is necessary to decide this purely legal issue. Moreover, the tribal court has no expertise in federal law. It thus can offer no legal analysis that could conceivably assist the federal courts in assessing the harm to the federal interests that would result from allowing

tribal courts to adjudicate claims of injury from nuclear materials.

Because the tribal court can contribute neither fact finding nor relevant legal analysis, requiring exhaustion "would serve no purpose other than delay." *Strate*, 117 S. Ct. at 1416 n.14. Here, as in *Strate*, postponing a decision by the federal courts on the jurisdictional issue would accomplish nothing except waste the resources of both the courts and the parties.

b. Respondents overlook the fact that the exhaustion issue presented by the petition will no longer be available for review if petitioners are required to exhaust their tribal court remedies. Petitioners have an undisputed right to a federal court determination of whether the tribal courts may properly exercise jurisdiction over respondents' claims. But that jurisdictional issue is separate from the issue of whether petitioners must first exhaust tribal court remedies. The latter issue will become moot if petitioners are forced to undergo unnecessary tribal court proceedings at two levels — trial and appeal — before they can obtain federal court review of the propriety of the tribal court's exercise of jurisdiction in the first instance.[1]

2. Respondents understandably attempt to minimize the force of this Court's holding in *Strate*. Pointing to the "express jurisdictional prohibitions" language of *National Farmers Union Insurance Cos. v. Crow Tribe*, 471 U.S. 845, 856 n.21 (1985), respondents argue that tribal exhaustion is required here because there is no explicit statement in either

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[1] *See, e.g., Church of Scientology v. United States*, 506 U.S. 9, 12 (1992) (citations omitted) ("a federal court has no authority to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it").

the AEA or the PAA divesting tribal courts of jurisdiction over nuclear tort claims. Br. in Opp. 5-6.

But *Strate* abandoned the stringent "express prohibition" standard of *National Farmers*. No federal statute expressly barred the exercise of tribal jurisdiction in *Strate*. Yet, the Court held that when "it is plain" that a tribe lacks authority to regulate a nonmember's conduct, "it will be equally evident that tribal courts lack adjudicatory authority over disputes arising from such conduct." *Strate*, 117 S. Ct. at 1416 n.14. In such a situation, when tribal court jurisdiction is challenged in federal court, "the otherwise applicable exhaustion requirement must give way." *Id.*

Here, as shown in the petition, "it is plain" from the comprehensive federal regulatory scheme of the AEA that Indian tribes have no authority to regulate nuclear health and safety matters. It follows inexorably from *Strate* that tribes also lack authority to adjudicate tort claims that place such matters at issue. Likewise, "it is plain" from the PAA that tribal courts are without authority to adjudicate nuclear tort claims, which the PAA designates as exclusively federal causes of action. Allowing tribal courts to adjudicate nuclear tort claims would clearly be inconsistent with the PAA's adjudicatory framework, including its provisions allowing for removal and consolidation of all such claims in federal court.

3. Respondents contend that petitioners have overstated the federal interests that are implicated by the tribal court's exercise of jurisdiction over respondents' nuclear tort claims. They argue (Br. in Opp. 3, 7-9) that the petition misstates the role of the states in regulating nuclear safety matters under the AEA and the role of state substantive law under the PAA's adjudicative scheme. This argument, too, is seriously mistaken.

a. Respondents erroneously assert that "[t]he federal government *does not* 'exercise exclusive authority to regulate nuclear safety' . . . and petitioners can cite no statute or regulation to support their contention." Br. in Opp. 3 (citation omitted). The AEA's pervasive regulatory scheme leaves no room for either the states or Indian tribes to regulate matters of nuclear safety and health.

Under the AEA, the role of the states in regulating nuclear safety is clearly circumscribed. The AEA permits the states to exercise regulatory authority over nuclear materials only with permission of the Nuclear Regulatory Commission ("NRC") and only in limited circumstances. *See* 42 U.S.C. § 2021. Specifically, the AEA authorizes the NRC, with certain exceptions, "to enter into agreements with the Governor of any State providing for discontinuance of the [NRC's] regulatory authority" with respect to certain nuclear "materials within the State." *Id.* § 2021(b). The NRC's regulations provide that, under this system, "the individual States may not, in the absence of an agreement with the [NRC], regulate the materials described in the Act from the standpoint of radiological health and safety." 10 C.F.R. § 8.4(a) (1997). Thus, as this Court has held on numerous occasions, "the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983); *see also, e.g., English v. General Elec. Co.*, 496 U.S. 72, 80-82 (1990).

By focusing on the now abandoned "express prohibition" phrase from *National Farmers*, respondents appear to be arguing that Congress' failure to mention Indian tribes in the AEA creates a regulatory gap, and that it therefore must be assumed that tribes can exercise regulatory authority over radiological health and safety issues. Respondents have things

backwards. If Congress has enacted general legislation that entirely federalizes a field of regulation and preempts the states from exercising regulatory authority, then that legislation will have a similar preclusive effect on Indian tribes.[2] Here, Congress has given the federal government exclusive and comprehensive authority over the field of nuclear health and safety. Accordingly, there is no room for the tribes to regulate such matters.

This Court's analysis of claims of federal preemption of state law is instructive. In the preemption context, as in the context of determining whether the exercise of tribal authority has been foreclosed, the objective is to discern congressional intent.[3] As the Court noted recently, "[s]ometimes courts, when facing the pre-emption question, find language in the federal statute that reveals an explicit congressional intent to pre-empt state law. More often, explicit pre-emption language does not appear, or does not directly answer the question. In that event, courts must consider whether the federal statute's 'structure and purpose,' or nonspecific statutory language,

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[2] *See Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 116 (1960) ("it is now well settled . . . that a general statute in terms applying to all persons includes Indians and their property interests"). *See also, e.g., Reich v. Mashautucket Sand & Gravel*, 95 F.3d 174, 179 (2d Cir. 1996) (citation omitted) ("tribal power, even regarding exclusively internal conflicts, may be limited by treaty or federal statute, . . . including statutes that are silent as to Indians"); *Smart v. State Farm Ins. Co.*, 868 F.2d 929, 932 (7th Cir. 1989) ("[g]eneral statutes . . . whose concerns are widely inclusive and do not affect traditional Indian or Tribal rights, are typically applied to Indians").

[3] *See, e.g., Barnett Bank v. Nelson*, 517 U.S. 25, 116 S. Ct. 1103, 1107 (1996) (question whether federal statute preempts state statute "is basically one of congressional intent"); *Smart*, 868 F.2d at 932 ("Congressional intent is paramount in determining the applicability of a statute to Indian Tribes").

nonetheless reveal a clear, but implicit, pre-emptive intent." *Barnett Bank v. Nelson*, 517 U.S. 25, 116 S. Ct. at 1107-08 (citations omitted).

Congress' intent in the AEA to make federal authority exclusive and to oust state authority is crystal clear, and so is the consequence for tribal jurisdiction: just as the states are deprived of authority to regulate matters of nuclear health and safety, so too are Indian tribes. Accordingly, tribes may not adjudicate nuclear tort claims because, as *Strate* holds, where there is no authority to regulate, there is no authority to adjudicate. *Strate*, 117 S. Ct. at 1413.

Respondents suggest (Br. in Opp. 10-12) that principles of tribal sovereignty differentiate this case from cases involving federal preemption of state regulatory authority. But whatever the scope of tribal sovereignty in the absence of federal limitation, this Court has from its earliest days recognized that tribal authority is subject to congressional regulation and diminution. *See, e.g., National Farmers*, 471 U.S. at 851 ("the power of the Federal Government over the Indian tribes is plenary"). Congress, by making regulation of nuclear safety the exclusive domain of the federal government, has unambiguously foreclosed the exercise of tribal jurisdiction. Under *Strate*, therefore, the court of appeals erred in requiring petitioners to exhaust tribal remedies.

b. Respondents flatly assert that the "proposition that the federal government's regulatory authority is exclusive" is "absolutely inconsistent" with the PAA which, according to respondents, "expressly provides that cases involving injury from nuclear incidents are to be governed by substantive *state* law." Br. in Opp. 3 (citing 42 U.S.C. § 2014(hh)). Respondents have simply misunderstood the PAA scheme.

The PAA states unequivocally that any "public liability action" — *i.e.*, any nuclear tort action — "shall be deemed to be an action arising under [the PAA]." 42 U.S.C. § 2014(hh). Thus, any claim for injury alleged to have been caused by the radioactive, toxic, or other hazardous properties of nuclear material — if actionable at all — must be brought under the PAA.[4] Moreover, state tort law does not operate independently from federal law within the adjudicatory framework of the PAA. Rather, in the PAA Congress has borrowed state law to provide the substantive rules of decision — as a matter of *federal* law.[5] And, within this scheme, the borrowed state law is subservient to federal law — it must be disregarded to the extent it is inconsistent with the PAA. *See* 42 U.S.C. § 2014(hh).[6] Beyond this, trial of any nuclear tort claim is, at the defendant's option, in federal court. *See id.* § 2210(n)(2) (removal provision).[7]

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[4] *See, e.g., In re TMI Litig. Cases Consol. II*, 940 F.2d 832, 854 (3d Cir. 1991) ("*TMI*") ("After the [Price-Anderson] Amendments Act, no state cause of action based upon public liability exists. A claim growing out of any nuclear incident is compensable under the terms of the Amendments Act or *it is not compensable at all.*"); *O'Conner v. Commonwealth Edison Co.*, 13 F.3d 1090, 1099-1100 (7th Cir. 1994) ("a state cause of action is not merely transferred to federal court; instead, a new federal cause of action supplants the prior state cause of action").

[5] *See TMI*, 940 F.2d at 856 (in the PAA "Congress intended that the rules of decision constitute federal law").

[6] *See also O'Conner*, 13 F.3d at 1100 ("Congress did not adopt in wholesale fashion state law. State law serves as the basis for the cause of action only as long as state law is consistent with the other parts of the Act.").

[7] *See also TMI*, 940 F.2d at 857 (the PAA "channels all legal liability to the federal courts, through [the newly created federal] cause of action").

In short, respondents are simply wrong in contending (Br. in Opp. 3) that the PAA does not create an exclusive federal remedy for nuclear torts. Allowing tribal courts to adjudicate nuclear tort claims such as those brought by respondents would conflict directly with the PAA's comprehensive adjudicatory scheme for public liability actions.

4. Respondents assert that the Tenth Circuit's decision in this case does not conflict with those of this Court or other courts of appeals. Br. in Opp. 2, 9-10. But the decision below is clearly in conflict with this Court's analysis in *Strate*. Moreover, as shown in the petition (at pp. 13, 18-19), other courts of appeals have refused to require exhaustion of tribal remedies in analogous situations. The Tenth Circuit here has gone far beyond any other court of appeals in requiring tribal exhaustion in the face of strong — indeed, congressionally recognized — countervailing federal interests.

In fact, in holding that petitioners must exhaust tribal court remedies, the court of appeals engaged in a "comity analysis" in which it expressly refused to consider the strong federal interests reflected by the AEA and PAA. Pet. App. 18a-22a. If the court had weighed the competing federal and tribal interests, it would have been compelled to conclude that the federal interests in maintaining exclusive regulatory control over nuclear health and safety matters and in preserving an exclusive federal remedy for nuclear tort claims easily overcome any tribal interests in adjudicating respondents' claims.

5. The decision below is of substantial concern to a number of industries in addition to the nuclear industry. *See, e.g.*, Brief *amicus curiae* of the Association of American Railroads ("AAR"). The AAR brief demonstrates why the Tenth Circuit's refusal to consider competing federal interests when applying the tribal exhaustion rule raises serious

concerns for the nation's railroads. AAR Br. 5-12. Likewise, the brief *amici curiae* of the Montana School Boards Association, *et al.*, illustrates a key concern expressed in *Strate*: the ability of government to regulate effectively in a particular area is undermined if an unrelated governmental entity is allowed to wield adjudicatory power. The far-reaching impact of the court of appeals' decision underscores the importance of the question presented and further demonstrates why that question warrants review by this Court.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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